FILED
No. (1) 98 426 SEP 11 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

CITY OF OXNARD; CHIEF HAROLD HURTT, individually and as Chief of Police; STAN MEYERS, individually and as Assistant Chief of Police; TOM CADY, individually and as Assistant Chief of Police; JOHN CROMBACH, individually and as Commander; BILL LEWIS, individually and as Sergeant; and DANIEL CHRISTIAN, individually and as Sergeant,

Petitioners,

vs.

JENNIFER JENSEN, individually and as Administrator of the Estate of JAMES REX JENSEN, JR., deceased; LINDSEY ELIZABETH JENSEN and KATELYN MELISA JENSEN, minors, by and through JENNIFER JENSEN as Guardian ad Litem,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Ninth Circuit creating a new constitutional tort for a police officer injured in the line of duty conflicts with the opinion of the United States Supreme Court in *Collins v. Harker Heights*, 503 U.S. 115 (1992), in which the Court refused to create such a constitutional tort for a public employee to sue his employer in federal court for deliberately indifferently subjecting him to a greater degree of the same kinds of risks routinely inherent in his chosen employment?

2. Whether the protections of the Fourth Amendment extend to a public employee injured by another public employee employed by the same city while implementing government operations?

3. Whether public employees who injure each other while implementing government operations may pursue a Section 1983 action, thereby allowing double recovery and introducing traditional state workers' compensation-type actions into federal court?

4. Whether the Ninth Circuit decision disturbs traditional roles of federalism in allocating the functions of federal and local government?

5. Whether the common-law tort doctrine of transferred intent is available in a Section 1983 action to transform what would otherwise be a garden-variety negligence case into a federal action?

6. Whether the Ninth Circuit decision is consistent with the principles set forth by this Court in the recent decision of *County of Sacramento v. Lewis*, ___ U.S. ___,

118 S.Ct. 1708 (1998) (which held that a deliberately indifferent police action which terminated the movement of an individual with whom the officer did not intend to interfere was not constitutionally cognizable)?

PARTIES TO THE PROCEEDING

The names of all parties to this proceeding in the United States Supreme Court appear in the caption of the case. There i no parent or subsidiary company of any party to be listed.

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Appendix A — Opinion of the United States Court of Appeals for the Ninth Circuit Filed May 28, 1998 . . . . . 1a

Appendix B — Order of the United States Court of Appeals for the Ninth Circuit Denying the Petition for Rehearing Filed July 20, 1998 . . . . . 20a

Appendix C — Order of the United States District Court for the Central District of California Denying Motion to Dismiss Filed June 26, 1997 . . . . . 22a

Petitioners, the City of Oxnard, Chief Harold Hurtt, Assistant Chief Stan Meyers, Assistant Chief Tom Cady, Commander John Crombach, Sergeant Bill Lewis, and Sergeant Dan Christian, respectfully request a petition for writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") is reported at *Jensen v. City of Oxnard, et al.*, 145 F.3d 1078 (9th Cir. 1998) (App. A). The United States District Court for the Central District of California ("district court") did not issue an opinion or explanation of ruling.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on May 28, 1998. The Ninth Circuit denied a timely petition for rehearing (and suggestion for rehearing *en banc*) on July 20, 1998. The Ninth Circuit granted the petitioners' motion to stay mandate pending presentation of this petition for writ of certiorari for 30 days from August 12, 1998.

This petition presents a pure question of law, on generally agreed-upon material facts. Petitioners contend that respondents failed not only to allege the violation of a constitutional right that was clearly established at the time of the acts in question, but also failed to establish the violation of any constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). Because the threshold component inquiry of the qualified immunity analysis is implicated, interlocutory appellate jurisdiction is permissible. *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); 28 U.S.C. § 1291.

The jurisdiction of this Court is also invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "No state shall . . . deprive any person of life, liberty or property, without due process of law."

The Fourth Amendment to the United States Constitution provides in relevant part that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

In relevant part, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Contrary to the opinion of the Ninth Circuit, petitioners assert that the Fourth Amendment is not intended to prohibit government from injuring its employees during the implementation of municipal law

enforcement operations. The Fourth Amendment recognizes two categories of persons, "the people" and, implicitly, the government, and protects the former from the latter's unreasonable actions. This Court clarified the scope of the protected class of "the people" under the Fourth Amendment by referring to seizures "of a free citizen." *Graham v. Connor*, 490 U.S. 386, 394 (1989).

In *Collins v. Harker Heights*, 503 U.S. 115, 127 (1992), this Court cited with approval the Seventh Circuit opinion in *Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986), which stated:

> [T]he bill of rights is a charter of negative liberties . . . . The bill of rights is designed to protect people from the state, not to ensure that the state supplies minimum levels of safety or comfort.

In *Collins*, this Court concluded that a municipal employee who was carrying out his government mission at the time of his accidental injury had no constitutional right under which his heirs could successfully maintain suit against the employing municipal corporation. The Court reasoned that the employee was injured by a peril endemic in his chosen occupation. The case was dismissed despite the fact that the complaint alleged that the municipality magnified the types of risks involved by ignoring prior warnings and state law.

Petitioners contend that *Collins* is a barrier to a civil suit pursuant to Section 1983 in circumstances where a public employee has agreed to a job function which involves routine exposure to a certain kind of risk and the employee is physically injured by the types of perils inherently contemplated by the job. In such a case, the public employee is acting as the government. The Fourth

Amendment, applied to the states through the Fourteenth Amendment, does not protect government from itself when government is acting as such in the implementation of its operations. In those circumstances, the public employees are not "free citizens."

In the present case, the respondents' decedent, Officer James Jensen ("Jensen"), was a City of Oxnard ("Oxnard") police officer who had volunteered for service with the SWAT team. During SWAT operations, Jensen was mistaken for an armed suspect and was shot by another SWAT officer.

On February 19, 1997, respondents filed their complaint in the district court alleging violations of Section 1983 by petitioners. Paragraph 9 of the complaint alleges that decedent and another officer, Sergeant Dan Christian, were police officers employed by Oxnard and were members of the SWAT unit.

Paragraph 15 of the complaint alleges that on March 13, 1996, at approximately 6:00 a.m., the Oxnard Police Department SWAT unit conducted a raid on a two-story townhouse in Oxnard for the purpose of serving a search warrant. As part of the SWAT operations, Jensen threw a flash-bang grenade from the staircase onto the second-floor landing.

Paragraph 16 of the complaint alleges that, thereafter, Jensen and other SWAT officers, including petitioner Sergeant Christian, ascended the staircase to the second floor. As Jensen entered a bedroom for the purpose of conducting a search, Sergeant Christian mistook Jensen for a gun-wielding occupant of the residence and shot and killed him.

On April 22, 1997, petitioners filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

Respondents filed opposition to the dismissal motion on May 1, 1997, contending at page 5, lines 18 through 21 thereof, that "Defendants admit that 'in the turmoil of events, Oxnard Sgt. Dan Christian mistook decedent for a gun-wielding occupant of the premises and shot him to death.' This mistake gives rise to liability for constitutional violations because Sergeant Christian was clearly intent on the seizure of the plaintiffs' decedent."

On May 19, 1997, the district court denied the motion to dismiss, without explanation. The district court filed its order denying the motion to dismiss on June 26, 1997.

On June 26, 1997, petitioners perfected their appeal. All parties filed briefs in the Ninth Circuit, and oral argument before the panel occurred on February 5, 1998. On May 28, 1998, the Ninth Circuit, in a published opinion, affirmed the denial of the motion to dismiss.

On June 11, 1998, petitioners petitioned the panel for rehearing and suggested rehearing *en banc*. On July 20, 1998, the panel denied the petition for rehearing and rejected the suggestion for rehearing *en banc*. On August 12, 1998, the Ninth Circuit granted petitioners' motion to stay mandate pending the filing of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH AMENDMENT IS INTENDED TO PROTECT FREE CITIZENS FROM GOVERNMENT, NOT TO PROHIBIT GOVERNMENT FROM INJURING A PUBLIC EMPLOYEE IN THE IMPLEMENTATION OF MUNICIPAL LAW ENFORCEMENT OPERATIONS.

Until the published decision in this case, no federal court has ever construed the Fourth Amendment to authorize a private right of action for damages in favor of one police officer against another and the employing public entity for physical injury while implementing the operations of government. In properly limiting the scope of the Fourth Amendment, this Court has emphasized that the Fourth Amendment applies "where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a *free citizen* . . ." (emphasis added). *Graham v. Connor*, 490 U.S. 386, 394 (1989). In the same opinion, this Court emphasized the primacy of textual construction and eschewed any generic excessive force standard.

Contrary to state tort law, status does matter in federal constitutional analysis. Whether or not a person is a trespasser in another person's home does not matter for purposes of suing the homeowner for a dangerous condition. But the United States Constitution, in contrast, is a document of limited application.

This Court's opinions have previously identified classifications of persons exempted from the protection of various constitutional amendments. For example, this Court has held that certain provisions of the Bill of Rights

do not apply to protect certain groups of persons. One category is school children.

In *Vernonia School District v. Acton*, 515 U.S. 646 (1995), this Court held that school children have a lesser privacy expectation with regard to physical and medical examinations and procedures than does the general population. This Court concluded that, consonant with the Fourth Amendment, students participating in athletic events could be required to undergo drug testing by compelled urine samples without probable cause to believe that drugs had been taken.

Another illustration of this Court's conclusion that school children, as a class of persons, enjoy substantially less constitutional protection than do other classes of persons is found in *Ingraham v. Wright*, 430 U.S. 651 (1977). In that case the Court held that school children could be excluded from the protections of the Eighth Amendment's proscription of cruel and unusual punishment and from the Fourteenth Amendment's substantive due process clause.

The Court held that students can be significantly beaten with no constitutional redress while hardened criminals suffering the same beatings at the hands of their jailers would have a valid claim for constitutional redress under the Eighth Amendment. The Court reasoned that the amendments cannot be wrenched from their historical and traditional contexts. Petitioners assert that these opinions, which hold that the status of "student" results in fewer constitutional protections than for other members of society, warrant the conclusion herein that a police officer's status limits his or her constitutional protections in certain circumstances.

The importance of textual exegesis is emphasized by the Court's decision in *Graham v. Connor*:

> The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized excessive force standard.

The Fourth Amendment protects citizens from a repressive government. There is nothing in the Fourth Amendment or in federal court decisions interpreting it which reflect a judicial concern with government accidentally injuring itself. This Court has stated:

> Since it is surely far more clear from the language of the Fourteenth Amendment that life is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under 1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under color of law establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the

> adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us that they do not support the construction urged by respondent.

Paul v. Davis, 424 U.S. 693, 698-699 (1976).

The recent opinion in *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) [*en banc*], illustrates that for purposes of constitutional analysis, status does matter. The Fourth Circuit held that the Fourth Amendment did not extend protection from excessive force to pretrial detainees even though the arrest of the pretrial detainee in that case occurred only two hours earlier. Because of the plaintiff's status as a pretrial detainee, the *en banc* Fourth Circuit held that claims of excessive force must be governed by the due process clause of the Fourteenth Amendment rather than by the Fourth Amendment. 115 F.3d at 1166. The Fourth Circuit identified the "textual" analysis of the various amendments as fundamental. 115 F.3d at 1164.

This Court has emphasized that the threshold inquiry in qualified immunity analysis is whether the Constitution does or does not grant the right in issue. In *Siegert, supra*, 500 U.S. at 232, this Court explained that a necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

A resolution of this purely legal question permits the trial court to expeditiously weed out suits which do not merit constitutional protection without requiring a public entity defendant to engage in expensive and time-consuming preparation to defend the suit on the merits. The Court concluded:

> We think the Court of Appeals should not have assumed, without deciding, this preliminary issue in this case nor proceeded to examine the sufficiency of the allegations of malice.

500 U.S. at 232.

The Ninth Circuit decision in the present case does not grapple with this issue at all. There is no textual analysis of the Fourth Amendment by the Ninth Circuit to determine whether decedent's status as a police officer, voluntarily engaged in implementing SWAT operations, distinguished him from the "free citizen" identified as the beneficiary of Fourth Amendment protection in *Graham v. Connor* (490 U.S. at 394). Instead, the Ninth Circuit relied upon an inapposite decision from the United States Court of Appeals for the District of Columbia.

The Ninth Circuit erroneously concluded that *Graham v. Davis*, 880 F.2d 1414 (D.C. Cir. 1989), warranted a dismissal of petitioners' motion in the instant case. The court characterized that opinion as allowing an officer to bring an excessive force Section 1983 action against other officers based upon an altercation with those officers following a completed arrest.

The facts of *Graham v. Davis*, however, are wholly inapposite to the instant case. In *Graham v. Davis*, the police were not carrying out any government operations. Therefore, government was not seizing government; rather, because there was no joint function involved, government was seizing a private citizen.

In *Graham v. Davis*, a plainclothes police officer had "subdued [a suspect]" by handcuffing and sitting on him. The officer "canceled his request for police

assistance." Another plainclothes officer, who did not know that the plaintiff was a police officer, "suddenly seized [the plaintiff] by the right shoulder from behind . . . and then struck him on the head" for no reason which anyone could ever figure out. Because no government operations were being implemented when Officer Davis used excessive force, the plaintiff was seized in his capacity as a free citizen.

This is not to say that when a police officer is not implementing government operations, and the officer's rights are violated by the police department, that the officer does not have the same right as any free citizen would to sue. An example is in the facts of *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992), a decision relied upon by the Ninth Circuit.

In *Jackson*, the Court held that a police officer compelled by his employing police department to give a urine sample despite the absence of probable cause had the same right as a free citizen to sue for illegal seizure. Officer Jackson, however, was not acting as a police officer when he was unconstitutionally seized, nor was he implementing any operations of government.

The officers in *Graham v. Davis* were unknown to each other and were not implementing any government operations when one suddenly attacked the other. The officers had never worked together in subduing the suspect. When the second police officer hit the plaintiff, he was not injuring government but, rather, was striking a private citizen who, having completed the arrest, was no longer functioning as an agent of government.

A second major difference between the instant case and the *Graham v. Davis* case is the defense raised by the defendants. The *Graham v. Davis* defendants argued that neither officer should be able to recover against each other

on their constitutional claims because mutual excessive force cases cancel each other out. Those defendants argued that mutual combatants who voluntarily engage in an altercation may not recover damages from each other. Those defendants argued that, like professional boxers who consent to be injured by consenting to combat, a police officer who had ceased to act in that capacity consented to be injured.

The petitioners do not present such a defense, which is adapted from British common law. The petitioners contend that the text of the Fourth Amendment does not protect government from government but, rather, only protects the people (including government employees when they cease to act as such) from government.

The petitioners assert that this Court's decision in *Collins* correctly found no constitutional right in favor of municipal employees injured by their employer's deliberate indifference in magnifying risks already inherent in the chosen occupation. Just as the *Collins* sewer worker's chosen occupation exposed him to known routine hazards, so also do police officers select a line of work whose implementation involves routine exposure to bullets and batons.

There are three good reasons for this Court to interpret the Fourth Amendment to protect free citizens as opposed to public entity employees acting as part of government. First, we cannot disregard or minimize the fact that, like the sanitation worker in *Collins* and the prison guard in *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986), police officers enter into their duties voluntarily and with full knowledge of the possible dangers faced by law enforcement personnel. Even more than the sanitation worker in *Collins*, a police officer's job involves routine exposure to danger. He or she is implicitly aware of the substantial risk of harm faced

daily. *Hartman v. Bachert*, 880 F.Supp. 342, 351 (E.D. Pa. 1995).

Second, concern for the welfare of public employees long ago resulted in the adoption of a comprehensive administrative system which has been in place in every state since 1913. This system is the workers' compensation system, which guarantees swift and certain recovery for workplace injuries. *United States Borax v. Superior Court*, 167 Cal.App.3d 406, 411 (1985). For example, in addition to several hundred thousand dollars in automatic death benefits, police officers receive enhanced benefits under the California Labor Code, including presumptions of compensability for various conditions, so-called Section 4850 time for temporary disability (full salary tax free for up to one year), and free scholarships for children when an officer is killed in the line of duty. Cal. Lab. Code §§ 4702 and 4709.

Finally, the sheer volume of constant contacts between police officers implementing government operations makes the Ninth Circuit's decision a sure font of unending tort litigation in federal court. Officers work together daily in difficult and demanding situations. The affirmation of the Ninth Circuit opinion which inappropriately creates a constitutional cause of action for public employees would vastly multiply the potential for Section 1983 actions. These actions, if pursued, will transform federal courts into workers' compensation tribunals and circumvent state programs to respond to employees injured at work.

II.

THE NINTH CIRCUIT OPINION IGNORES THE PROPER ROLE OF STATE GOVERNMENT IN A FEDERAL SYSTEM.

Petitioners contend that the Ninth Circuit opinion ignores the proper role of the states in a federal system. This Court has always respected the role of state governments in a federal system. In one opinion, this Court stated:

> The doctrine that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it . . . relied on by Mr. Justice Brandeis in his well-known concurring opinion in *Ashwander v. T.V.A.*, . . . is a well-settled doctrine of this Court which, because it carries a special weight in maintaining proper harmony in federal-state relations, must not yield to the claim of the relatively minor inconvenience of postponement of decision.

Clay v. Sun Insurance, 363 U.S. 307, 211-212 (1960).

More recently, this Court has again expressed deference under principles of federalism to valid and functioning state administrative tribunals, such as workers' compensation systems, which adjudicate similar and parallel rights to those vindicated by the constitutional process. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986).

A proper regard for the role of state administrative tribunals which are well established in every state and guarantee substantial monetary and other recovery for injured workers will preserve the balance of federal-state spheres of authority. As this Court has cautioned in *Collins*, 503 U.S. at 128:

> The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship.

Three cases decided in 1986 acknowledged the workers' compensation system as providing an acceptable alternative forum for public employees accidentally injured in the course of their employment. These decisions are: *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) [prison guard savagely beaten by prisoner due to unsafe reformatory conditions held not to have Section 1983 action against employer for reckless failure of state officials to remedy prison conditions]; *McClary v. O'Hare*, 786 F.2d 83, 87 (2d Cir. 1986) [recklessness of public entity employee in operating mobile truck crane, causing crane's boom to fall and strike co-worker in head, "however tragic," was adequately addressed by exclusive remedy provisions of state workers' compensation laws]; *Hayes v. Vessey*, 777 F.2d 1149 (6th Cir. 1986) [plaintiff teacher in state prison tragically raped due to deliberate indifference of institution in ignoring high levels of sexual tension within prison and failing to provide any security for female employees while assigning them to work among inmates in remote areas held random and unpredictable and adequately addressed by state workers' compensation tribunals].

III.

COLLINS ESTABLISHES THAT EVEN IF OXNARD DELIBERATELY INDIFFERENTLY INFLICTED INJURY UPON ITS EMPLOYEE ENGAGED IN LAW ENFORCEMENT OPERATIONS, THAT CONDUCT IS NOT CONSTITUTIONALLY REDRESSABLE.

In *Collins*, the complaint alleged that a widow's husband had a constitutional right to be protected from the city's custom of deliberate indifference toward the safety of its employees. The city had allegedly violated that right by not training its employees about the dangers of working in sewer lines, not providing safety equipment at job sites mandated by Texas law, and not providing safety warnings. The complaint also identified a prior incident which had given the city notice of the risks of entering the sewer lines, and the city intentionally failed to provide the equipment and training. The city moved to dismiss and the district court granted the motion.

This Court held that a municipal corporation's deliberate indifference in allegedly sending a municipal employee to his death was not constitutionally redressable because "petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment." 503 U.S. at 128. The *Collins* court cited with approval the Seventh Circuit opinion in *Walker*, *supra*.

In *Walker* the court found that the complaint of injured prison guards and the estates of some deceased guards against their employer stated no claim because the Constitution does not assure safe working conditions for public employees despite numerous acts of recklessness on the part of the public employer. The Seventh Circuit stated:

> The Bill of Rights is designed to protect people from the State, not, to ensure that the State supplies minimum levels of safety or comfort. . . . The State must protect those it throws into snake pits, but the State need not guarantee that volunteer snake charmers will not be bitten. It may not throw Daniel into the lion's den, but if Daniel chooses to be a lion tamer in the State's circus, the State need not separate Daniel from his charges with an impenetrable shield.

Petitioners assert that the *Walker* principles warrant the granting of their motion to dismiss herein.

IV.

THE NINTH CIRCUIT OPINION WOULD CONVERT FEDERAL COURTS INTO WORKERS' COMPENSATION APPEALS BOARDS.

The Ninth Circuit decision is not limited to a police officer shooting another police officer. Now, if the opinion is permitted to stand, any time there is an alleged seizure, one public employee can sue the other in federal court, claiming a violation of Section 1983 rights through the Fourth Amendment. The number of circumstances in which one officer can be attempting to apprehend a suspect and accidentally injure his or her partner is limitless.

The California Supreme Court, for example, has recently published a decision entitled *Calatayud v. State*, 98 Daily Journal D.A.R. 8527 (1998). In that case, two officers were grappling with a suspect. One officer was holding a shotgun which accidentally went off, seriously

injuring another officer. Had the other officer simply alleged that these acts constituted a reckless seizure, as the present respondents have, he too could have been in federal court suing for damages.

As one district court has observed, "Although it could be argued that Section 1983 litigation is already at flood stage, there appears to be no valid reason to open yet another dam." *Broadnax v. Webb*, 892 F.Supp. 188, 190 (E.D. Mich. 1995). Public entity employees volunteer to do a dangerous job in exchange for a certain level of importance, compensation, benefit packages, and sense of public duty. To convert the federal courts into glorified administrative tribunals adjudicating workplace conditions between employer and employee would deluge an already overburdened federal court system.

V.

THE POTENTIAL COST TO PUBLIC ENTITIES OF ALLOWING DOUBLE RECOVERY THROUGH THE WORKERS' COMPENSATION SYSTEM AND THE FEDERAL CIVIL RIGHTS SYSTEM IS STAGGERING.

California law provides strict liability for five categories of benefits for injured workers, regardless of fault or the percentage of work-related causation. These are permanent disability, temporary disability, vocational rehabilitation, unlimited lifetime medical care, and death benefits (cash to survivors, burial expenses, and college education for dependent heirs).

For municipal corporations with hundreds of thousands of law enforcement personnel in daily danger of accidental death or injury at the hands of fellow officers, the magnitude of financial exposure is staggering. Every time an officer recklessly swings a baton at a suspect and

accidentally strikes his or her partner, the public entity pays workers' compensation benefits.

However, after the Ninth Circuit decision, the public employer may also have to pay for defense attorneys' fees, expert witness fees, and costs in defending a Section 1983 action. In addition, the public entity may have to pay plaintiffs' attorneys' fees, expert witness fees and costs under Section 1988, plus, of course, unlimited financial indemnity to the physically injured officer or his heirs. Such indemnity will likely be imposed by a sympathetic jury (facing an injured law enforcement officer or his widow and children) with the 20/20 vision of hindsight. Petitioners contend that the Ninth Circuit has opened a Pandora's box of benefits which could potentially rupture the already under-funded public treasury.

VI.

THE NINTH CIRCUIT OPINION HAS CONSTITUTIONALIZED THE COMMON LAW OF TORTS WITHOUT CAUSE.

The Ninth Circuit's opinion borrowed from the common law of torts and applied the doctrine of transferred intent. This Court has cautioned against federalizing the common law of torts.

At common law, if a person intended to injure a third person but accidentally struck the plaintiff, the intent transferred over to supply the requisite *mens rea*. Because Sergeant Christian did not specifically intend to harm his partner, Jensen, the only way the Ninth Circuit could find liability was to dip liberally into tort law.

Now nothing is left of the distinction between the common law of torts, which requires only an intent to do the act as opposed to an intent to do the proscribed

consequence, and federal search and seizure law, which heretofore defined "intent" in the appreciably stricter criminal law sense of specific intent. The Ninth Circuit's cross-breeding has engrafted elements of the common law onto the Fourth or Fourteenth amendments, which makes them unrecognizable as such.

This Court's recent decision in *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S.Ct. 1708 (1998), prohibits the result reached by the Ninth Circuit. *Lewis* establishes that when the police try very hard to apprehend a suspect but deliberately indifferently control an unintended third party, who is seriously injured thereby, there is no Fourth Amendment seizure. *Lewis* specifically stands for the proposition that attempted but failed seizures of one person resulting in the unintended seizure of another are beyond the scope of the Fourth Amendment. *Lewis*, 118 S.Ct. at 1715.

In the *Lewis* case, the pursuing officer intended to terminate the movement of the fleeing motorcyclist but did not intend to control, terminate the movement of, or seize the motorcyclist's passenger; therefore, there was no Fourth Amendment seizure. Similarly in the present case, Sergeant Christian never intended to control, terminate the movement of, or seize Jensen, his partner.

Because there was no intended seizure, and *Lewis* prohibits the borrowing of the common-law doctrine of transferred intent, the instant facts must be analyzed under the Fourteenth Amendment. Liability is precluded under the rationale of *Lewis* because the high degree of culpability required for liability under the Fourteenth Amendment by definition from *Lewis* cannot be present where a law enforcement officer is attempting to seize a criminal suspect.

CONCLUSION

The facts of the instant case are tragic. Law enforcement personnel deserve the deepest admiration and gratitude for the protections which they provide daily. It is a sorrowful day when an officer is killed in the line of duty. *Hartman v. Bachert*, 880 F.Supp. at 351, 352. But as the Fourth Circuit stated *en banc*:

> It is always easy to second-guess. Tragic circumstances only sharpen our hindsight, and it is tempting to express our sense of outrage at the failure of an officer to act properly.

Pinder v. Johnson, 54 F.3d 1169, 1178-1179 (4th Cir. 1995) [*en banc*].

The Fourth Amendment was intended, as its text indicates and as *Graham v. Connor* construes it, to protect a class of persons known as "the people" or "free citizens." Employees of government implementing its operations, such as decedent, do not fall within that protected status.

As the Court concludes in *Collins v. Harker Heights*, public entity employees who agree to work in dangerous circumstances, and are injured or killed under those circumstances through exaggerated misconduct of their co-employees or employer, do not have a constitutional right of redress. Their remedy instead lies at state law:

> The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal

> Constitution, generally governs the substance of the employment relationship.

Collins v. Harker Heights, 503 U.S. at 128.

The Ninth Circuit's opinion now opens the federal courts to every officer accidentally — but allegedly deliberately indifferently — injured by his or her partner while trying to subdue or restrain a suspect. The fiscal impact of defense and indemnity costs in two tribunals — workers' compensation and federal court — upon already under-funded public entities is immeasurable. The Ninth Circuit has launched the Fourth Amendment onto a new ocean of limitless liability, and petitioners respectfully request this Court to right the ship.

Accordingly, petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted

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